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Supreme Court of the United States

JUNE TERM, 1969

No. [redacted]
203

ROBERT A. MOSES AND RICHARD P. MOSES, EXECUTORS OF THE ESTATE OF MRS. MIRIAM B. MOSES, DECEASED,

PETITIONERS

versus

THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ROBERT A. MOSES AND RICHARD P. MOSES, EXECUTORS OF THE ESTATE OF MRS. MIRIAM B. MOSES, DECEASED,

PETITIONERS,

versus

THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Executors of the Estate of Mrs. Miriam B. Moses, Deceased, as Petitioners, hereby petition this Honorable Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit adverse to them and entered March 10, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the Order of the District Court for the District of South Carolina granting judgment notwithstanding a jury verdict for Petitioners is dated March 10, 1969 and reported as *Moses v. Manufacturers Life Insurance Company*, 407 F. (2d) 1142, and printed in the Appendix hereto at page 38.

The Order of the District Court filed April 30, 1968, is reported as *Moses, et al v. The Manufacturers Life Insurance Company,* F. Supp. , D. C. S.C., 1968, and printed in the Appendix at page 27.

JURISDICTION

The decision sought to be reviewed was filed March 10, 1969.

The jurisdiction of this Court to review that decision by Writ of Certiorari is conferred by 28 U.S.C., Section 1254 (1) and 28 U.S.C., Section 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Courts below in a case which upon its particular facts is one of first impression have effectively deprived these Petitioners of the Seventh Amendment Constitutional guaranty of trial by jury by granting and affirming judgment notwithstanding the verdict of the jury despite substantial evidence adduced upon the submitted issues of duties owing their testatrix and breach thereof causing damage; therefore requiring issuance of a Writ of Certiorari to review same and ultimately requiring reversal and remand for reinstatement of the judgment on the verdict or for a new trial.

2. As an alternative question for review, whether the Court below so erroneously affirmed the commission of such prejudicial errors committed during the course of the trial by exclusion of evidence, refusal of instructions, and limitation upon damages as to have so effectively denied Petitioners a fair trial as to require such review and ultimate reversal and remand for a new trial.

CONSTITUTIONAL PROVISION INVOLVED SEVENTH AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented and which are either admitted, uncontested, or accepted as true in considering them in the light most favorable to the Petitioners are as follows:

On December 12, 1949, Mrs. Miriam B. Moses was issued a contract by the Respondent called a Guaranteed Retirement Pension Plan for an annual premium of $1,014.90; and for a period of 16 years she continued her relationship with the company not only by paying to it approximately $16,000.00 through the year 1965; but also through correspondence and the seeking of advice. Under the policy after an extension in 1960, she was to receive $87.63 per month for life beginning December 12, 1965, the maturity date, with that amount guaranteed to her estate or beneficiary for a minimum of ten years in the event of her death after maturity; and in the event of her death prior

to the maturity date, Respondent would pay the greater of the sum of the premiums paid in or the stated cash value of $18,410.00 to her named beneficiary or to her Executors as may be applicable.

The contract had on its face in bold type and enclosed in a black border entitled "IMPORTANT" the following (Printed in Appendix at page 39):

"IMPORTANT

When it is desired to obtain payment of any benefit under this contract write direct to the Manufacfacturers Life Insurance Company, Toronto, Canada, or communicate with the nearest authorized representative of the Company. By so doing time and expense may be saved, as the Company will furnish, free of charge, the required forms for completion together with any necessary advice and instructions.

Making a change in a contract or replacing a contract by a new one does not usually result in any advantage to the holder of the contract. The Company strongly urges that, before taking any action in regard to a contemplated change in, or replacement of, this or any other contract, the counsel and advice of the Company which issued the contract should be secured."

By letter dated August 23, 1965, (Trial Exhibit 2-C) she wrote the Company requesting information and advice and among other things stated: "I am totally unfamiliar with these things and I thank you for your help". The Company, after acknowledging her letter, wrote on September 9, 1965 (Trial Exhibit 2-E) and in this letter among other things gave her erroneous and false information when it asserted "If you elect to receive income on a quarterly

or annual basis, the income will be greater than if you receive the income on a monthly basis." Arithmetic shows the reverse to be true in each instance cited in the letter. It also set forth options not in the contract and which if selected would result in a change or addition to the policy.

On November 21, 1965 (Trial Exhibit 2-G) she again wrote the Company pointing out "I was hospitalized through September . . . " and she asked for advice concerning certain unguaranteed options, saying especially " . . . but wish to know advantages and/or disadvantages of one over the other".

The Company only wrote the letters in evidence and admittedly gave no advice or counsel and recommended no course of action. It had an agent in Sumter, South Carolina, Mr. Thomas Dabbs, CLU, but she did not know it; and the Company had never requested him to see, talk to, consult with, or advise her about her contract or the matters in correspondence. The Company letterheads showed the Chartered Life Underwriter designation.

Previously during September, 1965, Mrs. Moses, a widow, and almost sixty years of age, had been hospitalized as the result of radical face and neck surgery for a malignant cancer. The scars and results of the operation were readily visible; her speech was noticeably affected therefrom; she was in ill health, and her living habits worsened, again all apparent and visible, and all of which could have been seen by Respondent or its agents and taken into consideration. Although she had been a writer and had done some teaching, she had always been a poor business woman.

On November 30, 1965, for reasons not known she exercised the option first advanced in the September 9th

letter to take $104.94 per month, unguaranteed, instead of selecting $102.54 per month, which was guaranteed in all events for at least ten years, and in lieu of taking $18,410.00 cash, which had vested, and in lieu of her other vested contractual benefits which might be more beneficial. The options from which she ultimately chose, and which were presented by the Respondent, were not in the contract, and represented making a change in the contract. Financially speaking, she was not in need of $2.40 extra per month at the risk involved.

Mrs. Moses received seven checks of $104.94 each for the months of December, 1965, through June, 1966, totalling $734.59. On June 12, 1966, she died from a malignancy which had spread to her brain. The Company refused further payments to the Executors, the Estate being the Beneficiary, and suit was filed for actual and punitive damages in the State Court but removed upon diversity and requisite amount to the United States District Court for South Carolina.

It was shown at trial arithmetically that had no changes been made in the contract as it stood, she and her estate would have received over a period of ten years between $10,515.60 and $11,700.00, depending on the interest accumulations. The election which the company allowed or permitted her to make without advice, counsel, recommendation, or word of caution not only caused her and the estate to lose the above sums, but also to lose the cash value of $18,410.00, of which approximately $16,000.00 represented her funds which they had been holding and investing for a period of sixteen years, thereby permitting them to add to their general fund $17,675.00 (considering the $784.58 paid).

There was abundant evidence introduced showing cor-

respondence and contract between Mrs. Moses and the Company during the sixteen years of premium payment. The only testimony for the company was that of an actuary, which had no bearing on the issues. At all times the Company admitted it gave no advice, counsel, or recommendations of any kind.

The Petitioners attempted to introduce testimony and evidence concerning the ethics and standards of conduct in the insurance-annuity industry through live witnesses and written Code of the Chartered Life Underwriters in order to give a further basis for a norm by which the court and jury could measure reasonable conduct and due care. All such testimony and evidence was ruled out, although offers of proof thereon were made and are in the record. In addition, the Court declined certain requested instructions on behalf of the Executors, declined to submit punitive damages, and declined to permit the jury to consider loss of the cash value of the policy as damages.

For ease of determination of damage after punitive and larger damages were excluded, and to prevent confusion among the jurors, counsel agreed to have the Court permit a finding as to a monthly sum ranging from a minimum of $87.63 to $102.54 if a verdict were found for the Executors, which they would thereafter have actuarily computed. A jury verdict was found for the Petitioners for $87.63 per month for ten years, afterwards computed to be $8,702.02.

Upon motion by Respondent, and after argument, judgment notwithstanding the verdict was ordered on April 30, 1968. The United States Court of Appeals for the Fourth Circuit affirmed on March 10, 1969, 407 F. (2d) 1142. This Petition now seeks review and ultimate reversal of the said judgments and Orders of the Courts below.

ARGUMENT

1. Petitioners are informed and believe that the actions of the Courts below in granting to Respondent and sustaining a judgment notwithstanding the verdict of the jury have so invaded the province of the jury, have so infringed upon Petitioners' rights under the Seventh Amendment of the United States Constitution and applicable decisions of this Honorable Court, and have therefore so departed from the usual and accepted course of proceedings in a jury trial, as to call for and require an exercise of this Honorable Court's power of supervision, review and decision.

The Seventh Amendment printed, supra, page 3, provides " . . . and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

Because of the important role prescribed for the jury in our Federal system of jurisprudence this Court has said clearly as in *Atlantic & Gulf Stevedores Inc. v. Ellerman Lines,* 1962, 369 U. S. 355, 359, 360, 82 S. Ct. 780, 783, 784, 7 L. Ed. 2d 798, rehearing denied, 369 U.S. 882, 82 S. Ct. 1137, 8L. Ed. 2d 284:

" . . . But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them."

"This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury . . . . Thus, the provisions of the Seventh Amendment, noted above, are brought into play. As we recently stated in another diversity case, it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions'. *Byrd v. Blue Ridge Rural Elec. Cooperative,* 356 U. S. 525, 538, 539, 78 S. Ct.

893, 901, 2 L. Ed. 2d 953." (At 356 U. S. 539, 78 S. Ct. 901, appears the following: "An essential characteristic of that (Federal) System is the manner in which in civil common-law actions, it distributes trial functions between judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury"),

Hence, from this Constitutional command come the stringent considerations and requirements placed upon the Federal Judiciary when entertaining motions for judgments notwithstanding the verdict of a jury. For example, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 1962, 370 U.S. 690, 696 n. 6, 82 S. Ct. 1404, 1409 n. 6, 8 L. Ed. 2d 777, this Court said "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental (Petitioner) and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. . . . ".

Note 6. "As Professor Moore has indicated, 'In ruling on the motion (for directed verdict) the trial court views the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the Appellate Court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.' (Citations omitted)"

And in *Hawkins v. Sims*, 4th Cir., 1943, 137 F. (2d) 66, 67: " . . . Where there is substantial evidence in support of Plaintiff's case, the Judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the oth-

er side; *for under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility . . .* " (Emphasis added)

Hence, with these basic Constitutional guaranties and principles in mind, Petitioners believe they can clearly show that when the evidence adduced at the trial is considered in the light most favorable to them and then adapted to the law applicable to the issues of duty, breach, cause, and damage, these issues were properly submitted to the jury and that the Courts below have erred in their invasion of the Jury's province.

It must be kept in mind that this action was tried before a United States District Judge and a jury seeking *damages* at law, (not recission in equity), for the failure of Respondent to use a standard of care or conduct required of it by the language of the policy, its relationship to the insured, and other facts of the case, thereby directly and proximately causing loss or damage. Although the Complaint sounds in tort, whether it be considered in tort or contract, at all times the issues at the trial were those of duty, breach, causation, and damage. That was so understood at the time by the trial Judge. (See colloquy in note of Order of April 30, 1968, App. Page 32) And those issues were in fact the basis of his instructions to the jury.

This case is singularly different from all others reported and factually one of first impression in that in no case cited by the Courts below or found by counsel are there any comparable set of facts upon which to apply the relevant legal principles. The evidence presented by Petitioners, essentially undisputed and deemed admitted, showed:

1. A contract issued in 1949 with the "black bordered language" prominently displayed thereon. (*In this regard*

it is important to keep in mind that neither counsel nor the Court below can discover a reported case dealing with this subject which has this particular factual element). (Emphasis added)

2. Sixteen (16) years of a relationship through correspondence on questions, requests for advices, and payment of annual premiums of $1,014.00. (None of the reported annuity cases have such a relationship).

3. Vested rights in Mrs. Moses to substantial funds at all times during the 16 years; at the maturity date, at which time Respondent held $18,410.00 of her money which they owed by contract to her or her estate; and even vested rights at death. (None of the reported annuity cases seem to have vested rights and in them *they seek recission and return of premium, not damages*).

4. The policy itself with language on the face saying "Guaranteed for Ten Years". (No reported case has this indication or promise).

5. The policyholder writing and asking for advice and help in connection with her vested funds as the maturity date approached. (No reported case has this element).

6. The policyholder writing and informing the insurer of a lengthy hospitalization and specifically asking advice and counsel. (In no reported case was the insurer specifically put on notice of the insured's debility and in no case found was there a specific request for advice and counsel. (The Court in *Rishel v. Pacific Mutual Life Ins. Co.* 1935, 10th Cir., 78 F. 2d 881, might well have reached a conclusion contrary to the Courts below in the instant case based on the notice here. (Please see Headnote 19 at Pages 887, 888.)

7. The insurer admittedly failing to take the least

step to contact her personally, talk to her, advise or counsel her, caution her, or make any inquiries of her, even though it had a highly qualified agent available, but unknown to her. (Again no reported case which has the black bordered language and above relationships.)

8. Her debility and worsening health and living habits which were immediately discernible with a minimal inspection or visit. (This element is highly lacking in the reported cases.)

9. Respondent permitting the insured to vary the options available by permitting her to choose an unbelievable and ridiculous option without any word of caution whereby for a possible gain of $2.40 per month, or about $288.00 over 10 years, a vested amount of $18,410.00 was divested. (No such gross element could be found in any reported case).

10. The Respondent supplying false and erroneous information in its letter of September, 1965. (No other reported case indicates this).

It hardly needs citation of authority to state that there is a duty upon all to exercise reasonable care not to injure another (*Ramey v. Carolina Life Insurance Co.*, 1964, 244 S.C. 16, 135 S.E. 2d 362;) that actionable negligence may be based on violations of duties arising out of contract as well as where there is no contract, being imposed by implication or operation of law, and may arise from the relation or situation of the parties. 65 C.J.S. *Negligence*, Sections 4 (2) through 4 (7); *Dean v. Hershowitz*, 1935, 119 Conn. 398, 177 A. 262 ;and that "When one undertakes a professional assignment, . . . he may incur liability in tort by reason of negligent performance. *Fireman's Mutual Ins. Co. vs. High Point Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53."

But, in addition to general legal principles which would place duties upon the Respondent to use due care generally in its relationship to Mrs. Moses and her vested funds which it had, there is the important "black bordered language", whereby in plain and simple language, it undertook to advise and counsel her. The language must have some meaning or significance or the Company would not have put it there. It can not simply be ignored, as the Courts below have done.

In South Carolina, "it is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery. We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy." *Hann v. Carolina Casualty Ins. Co.*, S.C. , S.E. (2d) Smith's Advance Sheet No. 16, Opinion filed April 23, 1969.

In *McKendree v. Southern States Life Ins. Co.*, 112 S.C. 335, 99 S.E. 806, 807 the Court said "The ordinary man who buys a policy would judge the clause in issue to mean that which the plain words of it imply, and especially is that true when those words, in the instant case, are printed in bold type . . . . "

In *Graham v. Business Men's Assur. Co. of America*, 10th Cir., 43 F. (2d) 673 that court had to determine whether "Full Indemnity" printed on the margin of application, not even on the policy, should be given effect to increase the recovery. In reasserting that the ambiguity created must go against the insurer, it said, apropros of the instant case:

"It may be that this phrase on the application was intended as advertising matter, but it takes the form of a promise, and *its prominence is an added reason for enforcing it* . . . ." (Emphasis added. Should not the prominence of the "black bordered language" be an added reason for at least saying Respondent had a duty to advise and counsel? Query also, whether the language on the face "Guaranteed Retirement Pension Payable for at Least Ten Years" creates a sufficient ambiguity to require enforcing that specific jury finding?

But there is yet further judicial authority to show that the evidence created a duty, the case of *Guardian Life Ins. Co. of America v. Brackett* 27 N. E. (2d) 103 where the following language was on the policy:

"Notice: To collect the amount payable under this policy it is not necessary to employ any person, firm or corporation." With that language, in no way as strong as on the instant case, that Court said at page 109:

> "This endorsement was, no doubt, for the purpose of assuring the policy holder his interests would be cared for by the insurer, and that he need not expend money for counsel relative thereto. The policy holder had a right to rely upon the endorsement, and, no doubt, did so rely thereon when he purchased the policy, and under the facts found by the court that appellee informed the district agent of appellant, while said policy was in full force, that he had suffered a sunstroke, had been sick and wanted to cash his policy, that, under the circumstances, was a sufficient notice to place on appellant the duty to investigate the same, and in the fulfillment of the obligations created by the policy and the endorsement it was duty bound to investigate further, and had such further investigation been made, full information would have been received relative to

total disability, and appellant is held to have received such due proof as it would have discovered had it made such investigation."

It is important at this point to direct the Court's attention to the question of "fiduciary relationships or duties" since that was heavily adverted to in the Order for judgment n.o.v., and because it has a bearing on the degree of due care and attention owed by Respondent to Mrs. Moses. As Petitioners have shown, the Respondent owed her duties not only by common law principles, but also by virtue of the "black bordered language". In addition, Petitioners feel, and even sought instructions which were refused, that the facts were sufficient for a finding that there was a fiduciary relationship with its higher degree of duties owed and which might have warranted a larger verdict had it been submitted.

South Carolina follows the general rule that whether there is a fiduciary relationship is in each case a question of fact. *Devlin v. Devlin*, 1911, 89 S. C. 268, 71 S. E. 966. 36A C.J.S. *Fiduciary*, p. 387, citing a multitude of cases asserts:

> "The existence of a fiduciary relationship is not dependent on nomenclature or on the establishment of any particular relationship, and while it may be found to exist in any legal relationship, its existence does not depend on some technical relation created or defined in law. Thus a fiduciary status or relationship may exist as a matter of fact where it would not otherwise be inferred from the mere relationship of the parties, and although the relationship which does exist does not fall within any of the familiar forms."
>
> " . . . It is in each case a question of fact, for the law regards the real, rather than the nominal, condition. . . "

"A fiduciary relationship is not limited to legal and technical relations, and it is not necessary that the relation and duties involved be legal; they may be either moral, social, domestic, or merely personal . . . "

The issues and the case itself are apparently sloughed off merely by reference to *Rishel v. Pacific Mutual Life Ins. Co.*, 10th Cir. 1935, 78 F. (2d) 881, wherein it is stated at p. 886:

"While insurance contracts are *uberrimae fidei, Stepcich v. Metropolitan Ins. Co.*, 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895, an insurance agent does not stand in the relationship to his customer that a lawyer does to his client or a father to his son . . . . The law does not cast upon insurance companies the affirmative burden cast upon trustees who deal with the property of their cesturis."

That is certainly not authority for an assertion to the End of Time that there could not be a finding of fiduciary relationship between the Respondent and Mrs. Moses under the facts of this case. The facts determine that issue, and the facts are for the jury. (As a matter of definition *uberrimae fides* is nearly synonymous with a 'fiduciary relationship' being defined in Black's Law Dictionary p. 1181 "the most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight."

But it is not overly important to the action for damages, except as it might have increased damages, whether the duties to Mrs. Moses were plain simple duties to advise and counsel or whether they were fiduciary duties. The whole point is that there was abundant evidence for the jury to have found duties owing under the instructions as submitted.

The substantial evidence, in addition to warranting a finding of duties owed to advise and counsel, whether they be simple duties or fiduciary duties, likewise are sufficiently substantial for the jury to have made a finding of breach thereof causing damage.

The evidence showed her various vested rights; that Respondent proposed a change in the policy benefits; that she advised of lengthy hospitalization and asked advice and counsel to learn "advantages and disadvantages" of taking $102.54 per month for life guaranteed for 10 years as against $104.94 to cease at death.

Respondent admitted at all times at the trial and upon Appellate argument that it did not advise, counsel, caution, or recommend, as these terms are defined, but merely supplied information and accepted her choice (some of the information being in fact false).

The evidence also showed that Respondent knew of her hospitalization and therefore had notice to put them on inquiry (*Guardian Life and Rishel) Supra;* that it had an agent who was a Chartered Life Underwriter readily available in Sumter to confer with her, although she did not know it; that it did not request him to confer with her, did not make further inquiry or obtain further information as to her health, did not inquire or obtain information as to her living habits, her financial needs or business ability, her wants, or her kin.

The evidence further showed that had the Respondent looked it would have discovered a woman recovering from a serious operation to her face and neck with speech impaired; that if it had inquired it would have learned that she had had a malignant cancer removed and was not in good health; if it had inquired it could have discovered that while her living habits were eccentric, she was not in need

of a mere $2.40 per month in relation to endangering the vested lump sum or guaranteed benefits involved.

It is said that the evidence also showed that she knew of her own physical condition and financial situation. But what of that! Are these not factors for the jury to weigh, and not for the trial Judge? Could not the jury have reasonably determined that what she knew was of no significance, because when she had asked Respondent for advice as it had urged her to do, it then becoming its duty to learn her total situation in order to advise and counsel, which it then failed to do or do properly?

How can evidence be adduced in any case which could be more substantial so as to require submission to a jury which is the final arbiter of breach of duty, causation, and damage? Do not these facts entitle a jury to determine whether the Respondent rendered her the "counsel and advice" which it asked her to seek from it, and which it therefore owed to her by virtue of the lengthy relationship, possession of her funds, and the "black bordered language"?

Are these not sufficient substantial facts from which a jury could weight and determine whether Respondent acted as reasonably and prudent as it should have under the circumstances and relationship; and if Respondent had not so acted, then whether its negligence or breach of duties had caused damages, there being substantial evidence of amounts available and lost from which this could be computed.

Under stringent and restrictive instructions based upon the theory of duty, breach, cause, and damage, the District Judge submitted the matters to the jury, as was definitely proper then and which should be so declared now.

Unfortunately until now, by the judgment n.o.v., the District Court with approval of the Court of Appeals has been permitted to change the theory of the action from one for damage to an imagined one to set aside an election, equitable in nature, and then to substitute his opinion as to the weight, credibility, and total significance of the substantial evidence. Certain instances in which the trial court invaded the jury's province by his Order are apparent, including findings that "advice" and "counsel" do not mean Respondent had to do any more than give information; that it was immaterial that she put Respondent on notice of her serious hospitalization or that she asked for advice; that it did not have to investigate anything. As additional proof that His Honor took upon himself to determine and weigh the evidence, he found:

(1) "Her letters to the Defendant, incorporated in the record herein, indicate she understood the several alternatives available to her by way of settlement of her annuity contract, etc." As to this, in the letters she said, "I am totally unfamiliar with these things, and I thank you for your help".

(2) "She clearly knew what unguaranteed meant when she made her choice". As to this, in the letter she said, "I simply do not know what the word 'unguaranteed' covers or doesn't cover".

Was it not therefore for the jury to weigh and determine her understanding or lack of it?

Again the Court found: "The Defendant answered the inquiries of the annuitant fairly and truthfully". As to this, it was undisputed that it gave her certain false and erroneous information. Was this not also for the jury in its deliberations as to the total factual situation?

Hence, upon the foregoing, Petitioners contend that they were constitutionally entitled to a trial by jury; that they adduced more than substantial evidence to require submission to the jury; that the District Court was correct in so submitting the issues of duty, breach, causation, and damage; and that to permit the judgment n.o.v. to stand under the facts and circumstances of this case is to violate their Seventh Amendment rights and the mandate thereof proscribing the reexamination of the facts once tried by the jury.

The Writ of Certiorari should issue so that in the end the jury's verdict should be reinstated or a new trial ordered.

2. Should this Court feel that the Petitioners are not entitled to reinstatement of the judgment upon the jury's verdict, it is their alternate position that the judgment *n. o.v.* granted and approved below, should nevertheless be reversed and the action remanded for a new trial based upon errors so substantially prejudicial to the Petitioners committed by the District Court during the trial by the exclusion of evidence, refusal of instructions and limitations upon damages as to call for an exercise of the Honorable Court's power of supervision.

A. Exclusion of Evidence.

In order to lay a firmer foundation for the Court and jury to have a norm to measure duty and reasonable conduct on the part of the Company, Petitioners attempted to adduce testimony of agents trained in the life insurance and annuity field, as well as eliciting their opinions on reasonable course of conduct and relations which companies today have in carrying out their duties to their policyholders and insureds. In addition, evidence was of-

fered of a professional Code of Conduct and Ethics followed by agents professionally trained and designated Chartered Life Underwriter as well as the companies with which they are associated. The proferred testimony, hypothetical questions, opinions, and evidence are in the record. It was all highly relevant and material, especially that concerning Chartered Life Underwriters. The Respondent's letterheads carried the designation C. L. U. and this standard of ethics would have shown the high duty, even aside from the "Black bordered language", which was owed to Mrs. Moses by virtue of an industry standard of conduct to which the Company has ostensibly subscribed and imposed upon itself and from which the jury might reasonably have found duty to advise and counsel after full investigation and higher damages.

GUIDES TO PROFESSIONAL CONDUCT

"1. I shall, in the light of all the circumstances surrounding my client, which I shall make every conscientious effort to ascertain and to understand, give him that service which, had I been in the same circumstances I would have applied to myself.

"2. I shall place the welfare and interests of my clients above my own interests.

"3. I shall render continuing service and counsel to my clients."

The testimony and evidence was also highly competent since one qualified as an expert may render an opinion. *State v. King,* 158 S. C. 251, 155 S. E. 409. *Atlantic Coast Line R. R. Co. v. Columbia Salvage,* 138 S. C. 113; 135 S. E. 877 and standards of due care and proper conduct and of custom and usage in a particular business or industry are admissable. *Rhodes v. Dukes,* 128 S. C. 354, 122 S.

E. 872, 32 C. J. S. *Evidence*, Sections 546 (71) page 284; 546 (76) page 298, 546 (79) page 302.

Despite this, the Court below excluded the evidence and *would not even permit cross examination of Respondent's* one witness concerning "C.L.U." and its standards and ethics. All of this certainly was prejudicial to Petitioners. (Emphasis added)

B. Refusal To Charge.

Additional prejudice resulted in the refusal of Petitioner's requested instructions dealing with fiduciary relationships, duties, reasonable care, proximate cause and definitions of "advice" and "counsel". Sufficient discussion has been had in the argument to substantiate the relevancy, materiality, and competency of the requested instructions. Had the jury had the opportunity to hear these matters from the Court as guidelines, it might well have felt there was a more serious breach of a higher duty and made a higher award.

C. Limitations On Damages.

Lastly, it is submitted that the Court below committed prejudicial error by so greatly limiting the scope of damages. It must again be said that the action was not to set aside the election, but based upon breach of duty and damages therefor. At no time did Petitioners reduce the scope of the action. At Chambers His Honor stated he would not submit punitive damages since he did not consider it a tort action. Nothing further was said and no formal concession was made. He did not instruct thereon. Likewise, he did not permit the jury to consider whether lack of proper advice

caused loss of the cash value of Eighteen Thousand Four Hundred Ten ($18,410.00) Dollars; and no concession or reduction in demands were made as to that although it was discussed at Chambers: It must be realized that in the midst of a trial, when a judge has affirmatively indicated his views, the trial lawyer must take that into consideration in his manner and tactics, lest he cause the Court to become more adverse and cause his client to suffer therefrom. Unfortunately, informal conferences at Chambers establish certain guidelines, but are not in the record and not subject to review. In any event, while Petitioners believe they were prejudiced by the Court not giving the jury greater leeway, they would accept reinstatement of the verdict as stated before; but if a new trial be ordered, they would feel it only proper that they not be so limited in the range of recoverable damages.

CONCLUSION

Petitioners respectfully submit that under the peculiar facts of this case and the law applicable that their Constitutional guaranty of a trial by jury, free from prejudicial errors, would be highly infringed unless this Honorable Court exercises its power of supervision and review by granting this requested Writ of Certiorari to the Court of Appeals for the Fourth Circuit to the end that hopefully they may see reinstatement of the verdict of the jury of peers who saw the witnesses, heard the testimony, viewed the evidence, and rendered their collective decision; or for a new trial.

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